

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GAYLORD WILLIAM FUNKE,

Defendant-Appellant.

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UNPUBLISHED

March 2, 1999

No. 207167

Livingston Circuit Court

LC No. 97-009770 FH

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

MEMORANDUM.

Defendant appeals of right from his conviction of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(7)(d); MSA 9.2325(7)(d), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Hamburg Township police officers testified that they observed a pickup truck parked on the side of the road. Defendant was seated in the passenger seat, while Colleen Luttermoser was seated in the driver's seat. The officers believed defendant and Luttermoser to be intoxicated and told them not to drive. Thereafter, the officers observed defendant drive the truck into a parking lot. The officers conducted field sobriety tests, and arrested defendant for OUIL.

Both defendant and Luttermoser testified that Luttermoser drove the truck into the parking lot. They testified that the police arrived just after defendant assumed the driver's seat in order to leave the scene.

The jury found defendant guilty as charged. Defendant then pleaded nolo contendere to operating a vehicle while license suspended, second offense, MCL 257.904(1); MSA 9.2604(1). The court sentenced defendant to one to five years in prison for the conviction of OUIL, and to 54 days in jail for the operating conviction, with credit for 54 days.

A new trial may be granted on some or all issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). Defendant's argument that the jury's verdict was against the great weight of the evidence is

waived because he failed to move for a new trial in the trial court. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). However, we may consider the issue if failure to do so would result in a miscarriage of justice. *Richmond Twp v Erbes*, 195 Mich App 210, 218; 489 NW2d 504 (1992). No such miscarriage of justice would occur in the instant case. The officers testified that they observed defendant drive the truck into the parking lot. Defendant and Luttermoser testified that defendant did not drive the truck. The jury was required to assess credibility of witnesses in order to determine if the offense of OUIL had been proven beyond a reasonable doubt. Issues of credibility are left to the factfinder. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). We do not resolve credibility questions anew. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998).

Affirmed.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff